THE ROLE OF PROFITS IN PERSONAL INJURY ACTIONS

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INTRODUCTION

The question of the role of profits in personal injury litigation has caused considerable consternation in the courts. The following quotation from *Lo Schiavo v. Northern Ohio Traction & Light Co.*,[1] presents a statement of the status of the problem which would be equally apropos in most jurisdictions:

> The able and diligent efforts of counsel have pointed out the confusion which exists among the authorities upon these questions and the necessity for a rule . . . to govern the trial of cases similar to the instant case. It is indeed startling to discover that after the lapse of one hundred and twenty years from the time of the organization of this state not a single case has been reported by this court which will throw any light upon the legal question involved. It may be strongly suspected either that many similar cases have been decided without report or that motions to certify have been overruled. It is even more startling to observe that in many jurisdictions which have dealt with the question, the rules attempted to be announced have only resulted in causing even greater confusion. Text writers have never seriously attempted to evolve a uniform rule from the authorities, but have contented themselves with digesting the contradictory cases, and have many times used language showing a failure to grasp the principles involved.[2]

If the court had provided an answer equal to the need they expressed, this article could serve no better purpose than to present that opinion; however, the result of the decision has been "even greater confusion."[3]

When used in the article and by most of the courts, "profits" means the gain of an enterprise—income minus expenses.[4] "Earnings"

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[1] 106 Ohio St. 61, 138 N.E. 372, 27 A.L.R. 424 (1922).

[2] *Id.* at 67, 68, 138 N.E. at 374.

[3] Hanna v. Stoll, 112 Ohio St. 344, 147 N.E. 339 (1925); Gibbons v. Baltimore & Ohio Railroad, 92 Ohio App. 87, 109 N.E.2d 366 (1952); Dowd-Feder Co. v. Truesdell, 17 Ohio L. Abs. 647 (1934) *aff'd*, 130 Ohio St. 530, 200 N.E. 647 (1936); Lund v. Kline, 24 Ohio L. Abs. 387 (1937), *rev'd on other grounds*, 133 Ohio St. 317, 13 N.E.2d 575 (1938).

[4] "The excess of returns over expenditures in a given transaction or series of transactions." WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. 1938); "Profits represent the net gain made from the prosecution of some business after the payment of all expenses incurred." Goodhart v. Pennsylvania Ry., 177 Pa. 1, 35 Atl. 191 (1896). "Profit is ordinarily understood to refer to acquisition beyond expenditure or excess of value received over cost." Sutter Hospital of Sacramento v. Sacramento, 236 P.2d 186 (Cal. App. 1951), *aff'd*, 39 Cal. 233, 244 P.2d 390 (1952).

means personal earnings—the fruit of one's labor.[5] For the economist these would be totally inadequate definitions. They are acceptable for these purposes since they convey the impression that profits are not necessarily a measure of the pecuniary value of one's labor.

The problem of profits is not uniquely a problem of personal injury litigation. It may be raised in other actions—namely—tort actions where an instrumentality employed by the plaintiff for purposes of making a profit has been converted or destroyed by the defendant;[6] tort actions, or their statutory equivalents, where plaintiff's business has been destroyed or injured by some anti-competitive action of the defendant;[7] and in actions for breach of contract.[8] This article is addressed singularly to profits in personal injury litigation.

As a question of damages, loss of profits has existed as an issue as long as the action for personal injury itself. The present importance is due in part to the increased number of personal injury actions brought about by the advent of the automobile accident era.

The general theory of damages in personal injury litigation is one of compensation. The court attempts to put the plaintiff in the financial position he would have been were it not for the acts of the defendant. To accomplish this purpose, some of the major elements of damage to which the plaintiff is entitled are the reasonable value of medical expenditures,[9] pain and suffering,[10] fright,[11] humiliation,[12] inconveni-

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[5] ". . . [F]ruit or reward of labor—the price of services performed". Goodhart v. Pennsylvania Ry., *supra* note 4; Dempsey v. Scranton, 264 Pa. 495, 107 Atl. 877 (1919).

[6] Straley v. Fisher, 176 Va. 163, 10 S.E.2d 551 (1940); Byers v. Shelton, 282 S.W. 635 (Tex. Civ. App. 1926), 19 FORDHAM L. REV. 223 (1950).

[7] Roseland v. Phister Mfg. Co., 125 F.2d 417 (2d Cir. 1942); Wawak & Co. v. Kaiser, 129 F.2d 66 (7th Cir. 1942); Package Closure Corporation v. Sealright Co., 141 F.2d 972, (2d Cir. 1944); American Can Co. v. LaGoda Canning Co., 44 F.2d 763 (7th Cir. 1930) *cert. denied* 282 U.S. 899; John B. Stetson Co. v. Stephen L. Stetson Co., 58 F. Supp. 586 (S.D.N.Y. 1944) *cert. denied* 299 U.S. 605, 64 HARV. L. REV. 317 (1950).

[8] Collins v. LaVelle, 19 R.I. 45, 31 Atl. 434 (1895); Julian Petroleum Corporation v. Courtney Petroleum Co., 22 F.2d 360 (9th Cir. 1927); Comment, *Lost Profits as Contract Damages,* 65 YALE L.J. 993 (1956).

[9] Roland v. Murray, 239 S.W.2d 967 (Ky. 1951); Guerra v. Balestrieri 127 Cal. App. 2d 511, 274 P.2d 443 (1954); Texas & N.O.R. Co. v. Barham, 204 S.W.2d 205 (Tex. Civ. App. 1947); MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §90 (1935).

[10] Harris v. Breezy Point Lodge, Inc., 238 Minn. 335, 56 N.W.2d 655 (1953); Parrott v. Hanson, 180 Ore. 620, 175 P.2d 169 (1946); Campbell v. Hall, 210 S.C. 423, 435 S.E.2d 129 (1947); MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §88 (1935).

[11] Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950); Houston Electric Co. v. Dorsett, 145 Tex. 95, 194 S.W.2d 546 (1946). MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §88 (1935).

[12] Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952); Toller v. Cassinelli, 129 W.Va. 591, 41 S.E.2d 672 (1947); Mitchell v. Pla-Mar,

ence,[13] and impairment of earning capacity.[14] The courts divide impairment of earning capacity into loss of profits which refers to the past, and future impairment of earning capacity which refers to the future. This article rejects this distinction. The importance of any one of these elements will depend upon the particular facts of the injury. One of the few generalizations that can be drawn is that the amount of damage varies in direct proportion to the seriousness of the injury. This becomes tautological when it is observed that the seriousness of the injury must be defined with reference to the amount of damages suffered by the plaintiff. However, compensation for impairment of earning capacity differs from other elements of damages in that the amount of the award is not entirely dependent upon the seriousness of the injury. That is to say, if the owner and manager of an exclusive retail business and a janitor of that business were caused to suffer the same injury, all the elements of damages except impairment of earning capacity would be equal. This is not true of impairment of earning capacity because by hypothesis the earning capacity of one is greater than the other. Impairment of earning capacity then becomes a logical basis for the difference in the amounts of the verdicts for the janitor and the owner of the business.

Profits as an Element of Damage

Whether or not it was ever contended that future lost profits were an element of damage in personal injury cases cannot be determined. It is suspected that at one time it must have been so argued since most courts preface consideration of profits with a comment similar to "profits are not an element of damage."[15] One of the reasons that it is impossible to tell how seriously this was ever contended is that the evidence is also argued to be proof of impairment of earning capacity and the court usually bases its decision on this argument after it has commented that profits are not an element of damage. However, since the statement is so frequently repeated in the cases, perhaps an examination of the reasons for the principle should be examined.

Inc., 361 Mo. 946, 237 S.W.2d 189 (1951). McCormick, Handbook on the Law of Damages §88 (1935).

[13] Meiroto v. Thompson, 356 Mo. 32, 201 S.W.2d 161 (1947). McCormick, Handbook on the Law of Damages §88 (1935).

[14] St. Louis, I.M.&S. Ry. v. Eichelman, 118 Ark. 36, 175 S.W. 388 (1915); Texas Electric Ry. v. Worthy, 250 S.W. 710 (Texas App. 1923); Silsby v. Michigan Car Co., 95 Mich. 204, 54 N.E. 761 (1893); Steitz v. Gifford, 280 N.Y. 15, 19 N.E.2d 661 (1939); Goodhart v. Pennsylvania Ry. Co., *supra* note 4. McCormick, Handbook on the Law of Damages §§86, 87 (1935).

[15] Silsby v. Michigan Car Co., *supra* note 14; Muench v. Heinemann, 119 Wis. 441, 96 N.W. 800 (1903); Goodhart v. Pennsylvania R., *supra* note 4; Osterode v. Almquist, 89 Cal. App. 2d 15, 200 P.2d 169 (1948); Ray v. United Electric Rys. Co., 53 R.I. 173, 159 Atl. 637 (1932); Mitchell v. Chicago R.I. & P. Ry., 138 Iowa 283, 114 N.W. 622 (1908); Lo Schiavo v. Northern Ohio Traction & Light Co., 106 Ohio St. 61, 138 N.E. 372 (1922).

By an element of damage it is meant that if profits were to be treated as such, they would be equivalent to reasonable medical expenditures, pain and suffering, etc. Thus, if the plaintiff could establish the loss and could proximately relate it as a result of the defendant's action, he would be entitled to compensation in the exact amount that he proved the loss. Under this theory, the plaintiff would not have to show that the profits were the result of his physical or intellectual labors, but would only be required to prove that he would have had the sum incoming, and that because of the defendant's act he did not receive it. Of course, the plaintiff would have to prove to the satisfaction of the particular court what the profits would have been.

The courts decided that profits were not an element of damages because they reflect the return on the labor of others, the return on invested capital and the results of an active or inactive market.[16] Since such constitutent elements of profits are most probably not subject to the exercise of the plaintiff's influence, they will continue to exist or cease to exist independent of any act by the plaintiff or the defendant.[17] Thus, if the plaintiff could not have controlled these items while he was able, his disability caused by the defendant's act could not have caused the loss. The theory of damages prevalent in personal injury litigation does not require compensation for losses caused by other factors than the defendant's neglect.

The basic assumption by these courts remains as true today as it was the day it was formulated. The principle that profits are not an element of damage in personal injury litigation is valid not because it is a principle but because of the reason underlying it—namely—profits have constituent elements which could not be controlled by either the plaintiff's or the defendant's action and therefore the loss is not the result of the defendant's act.

Profits as Proof of Impairment of Earning Capacity

The next group of cases which must be considered in a discussion of the role of profits in personal injury litigation are those which raise the issue of whether profits are every evidence of earning capacity. Unlike the decisions on the question of profits as an element of damage, these cases run the entire gamut. Some courts decide that profits are evidence of earning capacity,[18] others say they are not,[19] while others

[16] "Profits derived from the management of a business are generally not to be considered as earning. The reason is obvious. Such profits usually result, not solely from the physical or intellectual labor of the person owning and managing the business but from combined capital and labor, labor not only of the person injured, but of others as well." Dempsey v. Scranton, *supra* note 5; Lo Schiavo v. Northern Ohio Traction & Light Co., *supra* note 15.

[17] Burns v. Dunham, Corrigan & Hayden Co., 148 Cal. 208, 82 Pac. 959 (1905); Chicago, R.I. & P. Ry. v. Scheinkoenig, 62 Kan. 57, 61 Pac. 414 (1900).

[18] Mahoney v. Boston Elevated Ry., 221 Mass. 116, 108 N.E. 1033 (1915); Dempsey v. Scranton, *supra* note 5; Baxter v. Philadelphia & R. Ry., 264 Pa. 467,

are indefinite as to their result.[20] This array of views not only exists between the jurisdictions but also exists within a single jurisdiction.[21]

Decisions Holding Evidence of Profits Inadmissible

One of the most frequent objections stated by the courts is that evidence of profits is too indefinite, too speculative and too conjectural.[22] The division between lost profits and future impairment of earning capacity mentioned earlier has probably resulted from this objection. Some courts seem to believe that a plaintiff is better able to show what he could have made from the date of the injury to the time of the trial than he can show what he could have made from the time of the trial to some date in the future.[23] If this belief is true, then it must be so because a plaintiff can show the condition of the economic past while he cannot show the economic future.

As has been stated, this article rejects th separation of lost profits

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107 Atl. 881 (1919); Mitchell v. Chicago R.I. & P. Ry. Co., *supra* note 15; Hart v. Village of New Haven, 130 Mich. 181, 89 N.W. 677 (1902); Kranold v. City of New York, 186 N.Y. 40, 78 N.E. 572 (1906); Offensend v. Atlantic Refining Co., 322 Pa. 399, 185 Atl. 745 (1936); Comstock v. Connecticut Ry. & Lighting Co., 77 Conn. 65, 58 Atl. 465 (1904); Wallace v. Pennsylvania Ry., 195 Pa. 127, 45 Atl. 685 (1900); Harmon v. Old Colony Ry., 168 Mass. 377, 47 N.E. 100 (1897); Sinclair v. Columbia Telephone Co., 195 S.W. 558 (Mo. App. 1917); Town of Elba v. Bullard, 152 Ala. 237, 44 So. 412 (1907); Chicago R.I. & P. Ry. v. Posten, 59 Kan. 449, 53 Pac. 465 (1898); Collins v. Dodge, 37 Minn. 503, 35 N.W. 368 (1887); Daull v. New Orleans Ry. & Light Co., 147 La. 1012, 86 So. 477 (1920); Atlanta v. Jolly, 146 S.E. 770 (Ga. App., 1929); Rosenthal v. Harker, 56 Utah 113, 189 Pac. 666 (1920); Washenko v. C. Schmidt & Sons, Inc., 2 N.J. 269, 66 A.2d 159 (1949); Ashcraft v. C.G. Hussey & Co., 359 Pa. 129, 58 A.2d 170 (1948); 1101 Park Ave. Corporation v. Cornell, 133 Misc. 397, 232 N.Y.S. 663 (1929); Loesberg v. Fraad, 119 Misc. 447, 197 N.Y.S. 229 (1922).

[19] Ray v. United Electric Rys. Co., *supra* note 15; Lombardi v. California Street Cable Ry., 124 Cal. 311, 57 Pac. 66 (1899); Lo Schiavo v. Northern Ohio Traction & Light Co., *supra* note 15; Bierbach v. Goodyear Rubber Co., 54 Wis. 208, 11 N.W. 514 (1882); Freedham v. Smith, 193 Minn. 569, 259 N.W. 80 (1935).

[20] Alpin v. Dean, 231 Ala. 320, 164 So. 737 (1935); City of Pueblo v. Griffin, 10 Colo. 366, 15 Pac. 616 (1887); Ball v. T. J. Pardy Construction Co., 108 Conn. 549, 143 Atl. 855 (1928); Spreen v. Erie R.R., 219 N.Y. 533, 114 N.E. 1049 (1916); Homan v. Franklin County, 40 Iowa 185, 57 N.W. 703 (1894).

[21] Lo Schiavo v. Northern Ohio Traction & Light Co., *supra* note 15 compared to Lund v. Kline, 24 Ohio L. Abs. 387 (1937); Kranold v. City of New York, *supra* note 18 compared to Spreen v. Erie R. Co., *supra* note 20; Town of Elba v. Bullard, 152 Ala. 237, 44 So. 412 (1907) compared to Alabama City, G & A. Ry. v. Lee, 200 Ala. 550, 76 So. 908 (1917); Freedham v. Smith, *supra* note 19 compared to Collins v. Dodge, *supra* note 18.

[22] Kleinbin v. Foskin, 321 Mo. 887, 13 S.W.2d 648 (1928); Mahoney v. Boston Elevated Ry., 221 Mass. 116, 108 N.E. 1033 (1915); Lo Schiavo v. Northern Ohio Traction & Light Co., *supra* note 15; Weir v. Union Ry. of New York City, 188 N.Y. 416, 81 N.E. 168 (1907); Normanden v. Kansas City, 206 S.W. 913 (Mo. App. 1918).

[23] Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S.W. 648 (1905); McCormick, Handbook on the Law of Damages §87 (1935).

and future impairment of earning capacity. There is a single term that fits both of these elements and that term is impairment of earning capacity. It is most illogical to say that evidence of profits may be introduced to show what damage the plaintiff has suffered at the time of the trial but that the same evidence cannot be projected into the future to show what damage he will suffer in the future, if any. In those cases reviewed where evidence of profits was admitted to show lost profits, not a single case stated that the plaintiff was required to show that the economic conditions had remained the same from the date of the injury to the time of the trial. Apparently, the courts are not concerned with the probabilities that such an economic change has occurred. Why then are they concerned about the probabilities of the change in the future? The fact that the plaintiff is able to show his past suffering with more definitness than he can show his future suffering has not caused the courts to refuse all evidence of future suffering. The evidence is admitted and its weight is determined by the jury. What makes the jury more expert at determining future suffering than future economic conditions is not disclosed by these cases. The distinction between lost profits and future impairment of earning capacity cannot be substantiated on the basis that the evidence of profits is more certain in the former case than in the latter case.

As regards evidence of profits for purposes of proving impairment of earning capacity, it must be admitted that there is an uncertainty about projecting the evidence of past profits into the future. Despite this admission, the question that remains is: Is that uncertainty so great that the plaintiff will not be allowed to introduce the only evidence that he may have of his earning capacity?

Although some courts continue to reject evidence of profits because of its speculativeness,[24] many courts have abandoned this position.[25] It is necessary for the plaintiff to prove his case, and if he does not offer any more evidence in a case today than he could have at the turn of

[24] See note 22 *supra.*

[25] "Certainly a recovery of damages of this nature contains no greater elements of uncertainty than are inherent in many personal injury cases, as for instance when recovery is permitted a parent for the decreased earning capacity during his minority of a child of 3½ years." Jackiewicz v. United Illuminating Co., 106 Conn. 310, 312, 138 Atl. 151 (1927). "Mere difficulty in the assessment of damages is not a sufficient reason for refusing them where the right to them has been established." Bridgeport v. Aetna Indemnity Co., 91 Conn. 197, 205, 99 Atl. 566 (1916). "It is error to submit to a jury the loss of earning power as an element of damage in the absence of proof upon the subject. But such proof need not be clear and indubitable to entitle it to go to the jury." Simpson v. Pennsylvania R.R., 210 Pa. 101, 59 Atl. 693 (1904). "We cannot agree with the defendant that the damages were speculative because the pecuniary loss sustained could not be proved with mathematical precision. Of necessity these damages must be an approximation and where, as here, they are proved with reasonable certainty, the precise amount of damages must be left to the jury." Ashcraft v. C.G. Hussey & Co., *supra* note 18.

this century, then it is not surprising to find the courts deciding that the evidence is too uncertain. There is much more reliable evidence today about the economic future than there has been in the past.[26] The plaintiff should present this evidence. Further, the recent trend of federal legislation is toward a more stable economy, and this fact should be made known to the court, especially if such legislation is directed to the protection of the plaintiff's type of enterprise.[27] Any court prone to decide that profits are too uncertain should be presented with the question of what makes profits more indefinite than a wage or salary. Labor organizations have so substantially tied wages and salaries to profits that they are bound to be influenced by the same economic principles that will determine profits. Still, the uncertainty that plagues profits has never troubled the courts in a wage and salary case.

A more liberal view has been adopted in Sherman Antitrust and breach of contract cases. In *Package Closure Corporation v. Sealright Co.*,[28] the Second Circuit Court of Appeals stated:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to

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[26] This statement should be expanded into an article itself. Today's businessmen are relying upon many sources of information for purposes of expanding their operation to meet future needs. The courts should not remain oblivious to this same material. For an excellent article seeking the use of this information in contract cases see Comment, *Lost Profits as Contract Damages,* 65 YALE L. J. 993 (1956).

[27] "From this deep faith have evolved three main purposes of our Federal Government. . . . Second, to help keep our economy vigorous and expanding, thus sustaining our international strength and assuring better jobs, better living, better opportunities for every citizen. . . ." The State of the Union message delivered on January 6, 1955, by President Eisenhower, 101 CONG. REC. 94 (1955). "It is hereby declared to be the policy of the Congress and the purpose of this title to protect and increase farm income. . . ." Agricultural Act of 1956, Public Law 540 §102, 70 STAT. 188, 7 U.S.C.A. §§1801-1837, 1851-1860, 1881-1888. Although the Federal Government has not become a guarantor of a completely stablized economy, there are many governmental activities which are toward the prevention of extreme deviations. Today, as this article is being written, there are proposals to reduce taxes, increase government building projects, etc., all designed to prevent a threatened economic "recession." These developments should remove part of the uncertainty which exists concerning the economic future. How successful this government activity will be remains to be seen, nevertheless this activity tends to increase the probabilities of a stabilized economy. As these probabilities increase, uncertainty decreases.

[28] 141 F.2d 972 (2d Cir. 1944). "The fact that damages cannot be calculated with absolute exactness will not render them so uncertain as to preclude an assessment. If a reasonable basis of computation be afforded by the evidence, that is sufficient although only an approximate result be obtained." Roseland v. Phister Mfg. Co., *supra* note 7. "Once evidence of damage has been established, plaintiff may recover even though the amount is not capable of definite mathematical ascertainment. In such cases the triers of the facts must fix the damages by reasonable estimate and approximation." Wawak & Co. v. Kaiser, *supra* note 7.

> deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such cases, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inferences, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case which he alone is responsible for making, were otherwise.

The profits that the plaintiff would have made cannot be determined with definitness because the defendant so substantially incapacitated the plaintiff that the profits were in fact not made.

In *Julian Petroleum Corporation v. Courtney Petroleum Co.*,[29] the court observed,

> No doubt there are elements of uncertainty in this case, such as the fact of production, the amount of production, its duration, the value of oil, and perhaps in other respects, but the testimony was the best obtainable, and we think under the authorities its weight was for the jury.

In the antitrust and breach of contract cases, lost profits are an element of damages rather than a mere measure of an element of damages. This difference, however, provides no basis for requiring more evidence in the personal injury cases than in the other cases. Also, in the antitrust and breach of contract cases the defendant is an intentional wrongdoer and therefore a "bad fellow," while in the personal injury action the defendant is a negligent tortfeasor who is apparently thought of as more of a "good fellow." Whether this distinction justifies the requirement of a different quantum of proof is a debatable question. In fact, whether the negligent driver should be considered a "good fellow" is equally open to question.

There are a few courts that have solved the problem of admissibility of evidence of profits by closing their eyes to reality. In *Spreen v. Erie R. Co.*,[30] an action for wrongful death, the widow was asked how much she received from her husband, who, prior to his decease, owned and conducted an express business. She was permitted to testify, "All he made in the business—$35 per week." This evidence was objected to on the ground that it was evidence of profits. The court decided that the rule against profits had not been violated since, "Not a single word was said about profits, in questioning the widow or in her response." In *Alabama City, G. & A. Ry. Co. v. Lee*,[31] the court duplicated the error of the *Spreen* case. In this case, the plaintiff owned

[29] 22 F.2d 360 (9th Cir. 1927).
[30] 219 N.Y. 533, 114 N.E. 1049 (1916).
[31] 200 Ala. 550, 76 So. 908 (1917).

and operated a sawmill. During his testimony, he was asked, "Before you were injured, how much did you earn per month?" The plaintiff answered, "I have made in the sawmill business as high as $100 per month." On appeal, the defendant maintained that this testimony referred to profits and therefore should have been ruled inadmissible. However, the court assumed that the testimony referred to a wage or salary, else the defendant through his cross examination would have shown that the evidence was of profits.

The approach taken by these courts is entirely indefensible. If profits are not admissible in evidence, and profits are defined as the gain of an enterprise, then the evidence was inadmissible in both of these cases. No useful end can be accomplished by condemning the use of the word "profits". If the gain of an enterprise is not an element of damages then this is just as true whether the gain is called a "zylch" or a "profit."

Decisions Holding Evidence of Profits Admissible

Those courts that decide profits are admissible in evidence do so on two theories: (1) that cases where profits are primarily comprised of the reward for plaintiff's personal services they become an element of damage and the evidence is therefore admissible,[32] and (2) that in such a case profits are evidence of earning capacity.[33] Although this disagreement as to theories of admissibility does exist, there is general agreement as to the cases in which the evidence is admissible. These cases are those where the profits predominately reflect the pecuniary value of the plaintiff's physical and intellectual labors.[34] In these cases the labor of others and the investment of capital must be inconsequential.

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[32] Sinclair v. Columbia Telephone Co., 195 S.W. 588 (Mo. App. 1917); Steitz v. Gifford, 280 N.Y. 15, 19 N.E.2d 661 (1939). "Under the above proof, the jury would have been justified in finding and doubtless did find that plaintiff in addition to other damages suffered under the first count, suffered also a loss of profits to the extent of about $600 per month for a period of about six months." Hollander v. Wilson Estate Co., 214 Cal. 582, 587, 7 P.2d 177, 179 (1932).

[33] "On the other hand, there are cases in which the allowances of proof of loss of profits of a business conducted with little or no capital is necessary on the ground that under the particular facts, such profits are entirely or almost entirely the direct result of the personal labor and endeavor of the owner, and subsequently, constitute the best standard of earning power." Dempsey v. City of Scranton, 264 Pa. 495, 499, 107 Atl. 877, 879 (1919). Mitchell v. Chicago R.I. & P. Ry. Co., 138 Iowa 283, 114 N.W. 622 (1908); Hart v. Village of New Haven, 130 Mich. 181, 89 N.W. 365 (1902); Kranold v. City of New York, 186 N.Y. 40, 78 N.E. 572 (1906); Offensend v. Atlantic Refining Co. 322 Pa. 399, 185 Atl. 745 (1936); Comstock v. Connecticut Ry. & Lighting Co., 77 Conn. 65, 58 Atl. 465 (1904); Chicago, R.I. & P. Ry. Co. v. Posten, 59 Kan. 449, 53 Pac. 465 (1898); Stafford v. City of Oskaloosa, 64 Iowa 251, 20 N.W. 174 (1884); Atlanta v. Jolly, 146 S.E. 770 (Ga. App. 1929).

[34] "Where the element of personal expertness is the essential and dominant factor and the capital invested is insignificant as compared with the earnings and merely incidental to the individual capacity which is the fundamental cause of

Perhaps the best illustration of a court which has encountered this difficulty because it seemingly did not recognize that there would be cases in which profits would approximate earning capacity is the Ohio Supreme Court. In *Lo Schiavo v. Northern Ohio Traction and Light Co.*,[35] the plaintiff owned and operated a trucking and fruit business. He employed three persons and had capital assets which included two trucks and one team of horses and a wagon. The plaintiff was permitted to testify as to the profits of his business. The Supreme Court in its opinion, reversing the lower court, observed:

> Since all authorities agree that loss of profits of a business is not a proper measure of damages in personal injury cases, the only sure way of correctly applying such a rule is to keep all evidence of profits from being in evidence.[36]

This case was followed by *Hanna v. Stoll*[37] where the plaintiff was a general practitioner in medicine and surgery. In an action for personal injuries the plaintiff alleged that he suffered a loss of earning capacity and his pleading contained an averment "that at the time of his injury he was earning $8000 a year." The court observed that the plaintiff "was lefthanded, and the evidence tended to show that a piece of glass embedded in the palm of his left hand had severed the tendon of the index finger, which would materially interfere with the practice of his profession, making it difficult if not impossible, to do certain things required of a general practitioner of medicine and surgery." Upon request, the trial court had instructed the jury that they might consider "loss of earning power, if any, that the evidence by its greater weight shows he will with reasonable certainty sustain in the future as a direct result of his injuries affecting his power to earn money." On appeal, the defendant contended "that in order to recover for loss of earning capacity it was absolutely essential to adduce evidence showing plaintiff's earning capacity so that the difference between his earning capacity before and after the accident could be determined. . . ."

The opinion quoted *Thompson on Negligence* as follows:

> Generally loss of earning power can only be considered as an element of damages where there is not evidence from which the pecuniary extent of such loss may be estimated, and where plaintiff asks damages because of his diminished earning capacity, but gives no evidence of his capacity before or after

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the income, then the income stands on the same basis as wages or salary and may be shown." Mahoney v. Boston Elevated Ry., 221 Mass. 116, 117, 108 N.E. 1033, 1034 (1915); Weir v. Union Ry. Co. of New York City, 188 N.Y. 416, 81 N.E. 68 (1907).

[35] 106 Ohio St. 61, 138 N.E. 372, 27 A.L.R. 424 (1922).

[36] *Id.* at 74, 138 N.E. at 376.

[37] 112 Ohio St. 344, 147 N.E. 339 (1925).

the accident the question of such damages should not be submitted to the jury.[38]

The Court concluded its opinion with the following statement:

> The authorities referred to indicate that such rule is applied somewhat strictly in cases where a professional man is seeking to recover damages for loss of earning capacity. In this case, concededly, there was no evidence whatever which could furnish a basis for determination of the loss incurred by plaintiff by reason of the impairment of his earning capacity, which for the reasons above indicated must have been a very material factor in the determination of the verdict awarded him. The rule above cited is peculiarly applicable to this case, and we must conclude that it was prejudicial error to instruct the jury that it could award damages for impaired earning capacity in the absence of evidence upon which such finding could be based.[39]

These two decisions, *Lo Schiavo* and *Hanna*, leave counsel for an injured plaintiff in an almost impossible position. The *Lo Schiavo* case forecloses the introduction of profits into evidence, and the *Hanna* case requires such proof in the case of a professional person. How can the decreased earning capacity of a "general practitioner in medicine and surgery," who has been caused to suffer a "severed tendon of the index finger," be shown unless it is possible to introduce evidence of his decreased income which admittedly is in the form of profits?

The facts in the *Lo Schiavo* case warranted the conclusion that profits were not a measure of the plaintiff's earning capacity. This is true because of the amount of labor of others and the capital investment involved. However, the court went further than to decide that case. They attempted to solve all future cases by saying that profits were not a measure of earning capacity in any personal injury action. The *Hanna* case then presented the problem of what evidence is available to a person whose earnings are in the form of profits, when the profits have as their primary constituent the pecuniary value of the plaintiff's personal services. By its failure to see that profits were the best evidence of earning capacity, the *Hanna* decision relegated the plaintiff to a position where plaintiff would otherwise probably not be found. There is no labor market for a doctor who by the exercise of his preference desires to stay in private practice. Nor is there any better way of determining his earning capacity other than comparing his past earnings with what he is presently able to earn, because such a person himself has never submitted his earning capacity to any other measurement. How valid is it to say to a doctor who has been earning $8,000

[38] *Id.* at 351, 147 N.E. at 342, quoting from 6 THOMPSON ON NEGLIGENCE, §7307.

[39] *Id.* at 354, 147 N.E. at 342.

as a general practitioner that he must show his earning capacity through evidence of the amount that he could have earned as an industrial doctor or as a staff doctor in a hospital? If this reasoning has any basis, why should he not be allowed to show how much he could have earned as the private physician of the President of the United States? The obvious answer is that he is neither an industrial doctor, a staff doctor, nor the private physician of the President. He is a private practitioner, and the best evidence of his earning capacity as such may well be the profits that he earned while practicing.

The final answer to this problem has not been given by the Ohio Supreme Court. The lower courts are apparently dissatisfied with the strict language employed by the *Lo Schiavo* opinion. In *Lund v. Kline*,[40] the plaintiff was engaged in soliciting order for his tailoring concern. The tailoring was accomplished by employees of the plaintiff. The trial court permitted the plaintiff to testify that as a result of the injury his earning capacity was impaired by $2,000. The defendant argued that this was evidence of profits and therefore inadmissible, citing the *Lo Schiavo* and the *Hanna* cases in support of his argument. The opinion of the appellate court concluded as follows:

> We believe that due to the character of the plaintiff's business, and the method in which he conducted it, that the evidence submitted to the jury was competent, and that there was no error in permitting it to go to the jury.[41]

The appellate court does not deny that the testimony referred to profits, nor does the court indicate that the *Lo Schiavo* case permits exceptions to its sweeping rule. The "character of the plaintiff's business" must refer to the fact that the profits of the business were primarily the result of plaintiff's personal services which make the earnings more like the definition of "earning capacity" rather than "profits." Thus, the bold statement of the *Lo Schiavo* case undergoes the processes of legal erosion. Profits should be considered admissible in those cases where they reflect the plaintiff's earning capacity as their primary constituent.

It was noted at the beginning of this section that courts admit the evidence on one of two theories. The issue of the preferability of one theory over another is raised because of the great number of reversals that occur in these cases. It is reasonable to assume that the confusing language of the upper courts is the cause of the resulting confusion. The fact remains that in a given case the choice between theories will most probably not affect the result in that particular case.

Some courts say that in the cases where it can be shown that the profits are the result of the plaintiff's personal endeavors there is an ex-

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[40] 24 Ohio L. Abs. 387 (1937), *rev'd on other grounds*, 133 Ohio St. 317, 13 N.E.2d 575 (1938).

[41] *Id.* at 395.

ception to the rule that profits are not an element of damage.[42] Why the issue of whether profits are an element of damage is reexamined when the question concerns the admissibility of the evidence is not clear.[43]

There is no case where the other factors, which have caused the rule against profits to come into existence will entirely disappear. They will be constituent elements of profits in every case. The only difference between the cases will be the degree to which these factors prevail. To say that in some there is an exception to the rule and that profits are an element of damages in those cases, means that the plaintiff is entitled to the amount of profits resulting from the labor of others and the return on investment of such amount is not so large as to predominate. This is indeed a curious result. These factors should not be an element of plaintiff's damages no matter how small. The defendant should always be able to get an instruction to the effect that the evidence of profits is only evidence of earning capacity and to the extent that the jury determines it to be the result of other factors than the plaintiff's physical and intellectual labors, that amount should not be a part of their award. If the defendant is entitled to an instruction of this type, a fact with which all courts agree,[44] then profits are not an element of damage, but are evidence of an element of damage. Profits are no more of an element of damage than salaries or wages are. They are evidence of earning capacity just as salaries and wages are.

One answer to this criticism will be that this is a legal technicality which could not be explained sufficiently for the jury to discern the differentiation. Irrespective of this, the error of these courts is going to complicate unnecessarily the decision in a case where, although the plaintiff's enterprise is one which would not fit within the exception, the plaintiff is able to reduce the profits to their separate elements and introduce only that part which represents his earning capacity.[45] If a court has adopted the theory that only certain cases fall within the exception, then to permit this evidence they must create an exception to the exception or refuse the evidence.[46]

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[42] *Supra* note 32.

[43] The only reason that a court would have to return to the rule would be if the evidence was urged to be evidence of an element of damage—namely—loss of profits as opposed to the theory that it is evidence of earning capacity.

[44] Alitz v. Minneapolis & St. L.R. Co., 196 Iowa 437, 193 N.W. 423 (1923); Ashcraft v. C.G. Hussey & Co., 359 Pa. 129, 58 A.2d 170 (1948); Offensend v. Atlantic Refining Co., 322 Pa. 399, 185 Atl. 745 (1936); Texas Electric Ry. v. Worthy, 250 S.W. 710 (Texas App. 1923); Dempsey v. Scranton, 264 Pa. 495, 107 Atl. 877 (1919); Town of Elba v. Bullard, 152 Ala. 237, 44 So. 412 (1900); Chicago R.I. & P. Ry. Co. v. Scheinkoenig, 62 Kans. 57, 61 Pac. 414; Rosenthal v. Harker, 56 Utah 113, 189 Pac. 666 (1920).

[45] Kranold v. City of New York, 186 N.Y. 40, 78 N.E. 572 (1906).

[46] This is true since presumably the only time a plaintiff would want to segregate the elements of profits would be a case where the other factors constituted a noticeable portion. These cases by definition are cases where profits cannot be introduced and therefore do not fit the exception.

Other cases have permitted the evidence on the theory that it is the best available evidence of earning capacity.[47] This is a more desirable analysis. Profits of a business are not the same as earning capacity so long as they reflect other factors. They may or may not include plaintiff's earning capacity. When the other factors can be shown to be *de minimus* and the remaining known factor is plaintiff's physical and intellectual labors then profits become evidence of earning capacity.

In evidentiary terms, testimony must be related to something which the plaintiff is entitled to prove.[48] If the evidence increases or decreases the probabilities of a material proposition, then that evidence is relevant.[49] When profits are reduced to the state that they predominately demonstrate the plaintiff's earning capacity, and the plaintiff can show that since the injury he has been unable to earn these profits, then the evidence increases the probabilities of the truth of the material proposition that plaintiff has suffered an impairment of earning capacity. It is relevant and admissible. Not only does the evidence show that the plaintiff has suffered an impairment of earning capacity, but it also shows the pecuniary extent of the impairment.[50] When a court answers the issue of admissibility of evidence of profits on the basis that it is not admissible because they are not an element of damage, the court has totally failed to overtly recognize the problem. The rule that profits are not an element of damage was never designed to settle the evidentiary issue.[51] That rule is a restatement of the theory of damages in personal injury cases—namely—the defendant shall be liable only for those damages which are the proximate result of his act. When profits have been shown to predominately reflect the pecuniary value of plaintiff's physical and intellectual labors, and the plaintiff has been disabled by the defendant's act, then the impairment of earning capacity is the result of defendant's act and the plaintiff is entitled to compensation.[52] The argument as to the constituents of profits should be made to the court for purposes of determining the relevancy of the evidence. The jury will then receive only that evidence of profits which has been determined to show plaintiff's earning capacity.

In *Offensend v. Atlantic Refining Co.*[53] it was determined by the court, in accordance with the rules of relevancy, that the evidence of

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47 See note 33 *supra.*

48 1 WIGMORE, EVIDENCE §27 (3d ed. 1940).

49 *Ibid.*

50 Sinclair v. Columbia Telephone Co., 195 S.W. 558 (Mo. App. 1917); Rogers v. Youngs, 252 Mich. 420, 233 N.W. 365 (1930).

51 The rule against profits was designed to be a substantive rule of damages not a rule of evidence. The only time that it will be necessary to consider the rule as regards evidence is when the evidence is sought to be admitted on the theory that profits are an element of damage. The rule causes such evidence to be immaterial.

52 See note 33 *supra.*

53 322 Pa. 399, 185 Atl. 745 (1936).

profits was the best evidence of earning capacity. The plaintiff was permitted to testify that his profits for the last year prior to the injury were $1701. He claimed total loss of earning capacity for two years and eight months. The jury awarded him $4536, an exact computation using plaintiff's testimony multiplied by the period of total disability. About this exact computation the Pennsylvania court stated:

> Although net earning for a single year, especially when proximate in time to the period when a loss of earning power was suffered, may have some evidential bearing on the question, it is evident that many other factors of importance might be influential and material during the period involved. The court should have instructed the jury more carefully upon the weight to be given to all the material elements having a bearing upon the question of earning power. It is evident here that the jury was guided largely by appellee's statement of his net income for a single year. Under the circumstances, we are forced to conclude that the damages assessed for loss of earning power were in excess of those warranted by the evidence, and the true measure for their calculation.[54]

Although it is true that the jury should be instructed that this evidence is solely for the purpose of determining the amount to be awarded for impairment of earning capacity, as this jury was instructed, if they determine that they will decide the case on the basis of the evidence presented at the trial, the verdict should not be disturbed. The reviewing court should not be concerned with the obviousness of the jury's mathamatical computation. If neither the plaintiff nor the defendant can further segregate the elements of profits, the jury can hardly be expected to do so.

Proof of Impairment of Earning Capacity

Since the courts are divided on the admissibility of evidence of profits this section must be further divided into, *Proof of Impairment of Earning Capacity in Jurisdictions Where Evidence of Profits is Admissible* and *Proof of Impairment of Earning Capacity in Jurisdictions Where Evidence of Profits is Inadmissible.* This division will also permit a discussion of cases where, although the court would otherwise admit the evidence, the evidence is found to be irrelevant, because it does not reflect the plaintiff's earning capacity. All that is said in the latter subsection will be equally applicable to these cases. It should be remembered that, despite language to the contrary, a court rarely will improperly exclude the evidence if it is properly presented.[55]

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[54] *Id.* at 405, 185 Atl. at 747, 748.

[55] Lund v. Kline, 24 Ohio L. Abs. 387 (1937), *rev'd on other grounds,* 133 Ohio St. 317, 13 N.E.2d 575 (1938), where the evidence was allowed despite Lo Schiavo v. Northern Ohio Traction & Light Co., 106 Ohio St. 61, 138 N.E. 372 (1922).

Proof of Impairment of Earning Capacity in Jurisdictions Where Evidence of Profits is Admissible

The admissibility of evidence of profits depends upon a determination of the relevancy question. Therefore no formula requiring specific results can be designed. The evidence should be admitted when it is more probable, as a matter of experience, reason and logic, that the profits are the result of the personal labors of the plaintiff, rather than the labor of others or a return on investments. The evidence should be excluded when the opposite is true. In general economic terms the plaintiffs who most probably will be able to have the evidence admitted are the professional,[56] the private entrepreneur[57] and the person whose earnings are dependent upon a fee which he receives for the rendering of a service.[58] On the other hand, the plaintiffs who most probably will not be able to have the evidence admitted are the merchant,[59] the manufacturer,[60] the member of a partnership[61] and the industrial executive whose earnings are dependent upon the profits of a business which he owns, manages, or operates.[62] These are mere labels primarily designed for other purposes and cannot be used as a substitute for the underlying test. Each case must be decided upon its facts, and no matter how a person is styled by the business world, before he can introduce evidence of profits, he must show that they are most probably the result of his physical and intellectual labors.

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[56] Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S.W. 648 (1905) (physician); Stafford v. Oskaloosa, 64 Iowa 251, 20 N.W. 174 (1884) (physician); Collins v. Dodge, 37 Minn. 503, 35 N.W. 368 (1887) ("professional man"); Marshall v. Wabash R. Co., 171 Mich. 180, 137 N.W. 89 (1912) (surgeon); Nye v. Adamson, 130 Neb. 887, 266 N.W. 767 (1936) (attorney); Goode v. Wills, 135 Cal. App. 21, 26 P.2d 504 (1933) (professional dancer).

[57] Alabama City, G. & A. Ry. Co. v. Lee, 200 Ala. 550, 76 So. 908 (1917) (sawmill owner); Texas Electric Ry. v. Worthy, 250 S.W. 710 (Texas App. 1923) (automobile agency); Muench v. Heinemann, 119 Wis. 441, 96 N.W. 800 (1903) (grocer); Steitz v. Gifford, 280 N.Y. 15, 19 N.E.2d 661 (1939) (farmer); Rogers v. Youngs, 252 Mich. 420, 233 N.W. 365 (1930) (boarding house operator); Beebe v. Greene, 34 R.I. 171, 82 Atl. 797 (1912) (teamer); Hart v. Village of New Haven, 130 Mich. 181, 89 N.W. 365 (1902) (livery stable owner); Kranold v. City of New York, 186 N.Y. 40, 78 N.E. 572 (1906) (salesman); Offensend v. Atlantic Refining Co., 322 Pa. 399, 185 Atl. 745 (1936) (cattle dealer); Sinclair v. Columbia Telephone Co., 195 S.W. 558 (Mo. App. 1917) (farmer); Town of Elba v. Bullard, 152 Ala. 237, 44 So. 412 (1907) (dressmaker); McLane v. Pittsburg Rys. Co., 230 Pa. 29, 79 Atl. 237 (1911) (peddler).

[58] The type of cases falling under this heading involve such people as television repairmen, plumbers, etc. There were no cases found wherein these persons were involved.

[59] Mahoney v. Boston Elevated Ry., 221 Mass. 116, 108 N.E. 1033 (1915); Dempsey v. Scranton, 264 Pa. 495, 107 Atl. 877 (1919); Pueblo v. Griffin, 10 Colo. 366, 15 Pac. 616 (1887); Lo Schiavo v. Northern Ohio Traction & Light Co., 106 Ohio St. 61, 138 N.E. 372 (1922); Weir v. Union Ry. Co. of New York City, 188 N.Y. 416, 81 N.E. 168 (1907).

[60] Silsby v. Michigan Car Co., 95 Mich. 204, 54 N.W. 761 (1893); Gentile v.

The manner of presenting evidence of impairment of earning capacity will, of course, depend upon the individual counsel's trial technique. However, there are certain minimum requirements that demand compliance.

First, the duration of the impairment must be shown.[63] By duration it is meant that the plaintiff must show whether the impairment is permanent, temporary or indefinite. The proof required to establish this fact is no different than that required to show duration as regards other elements of damage like pain and suffering, medical expenditures and inconvenience. Counsel should relate the proof of duration to each of these elements, so that the jury will not be as likely to decide on their own that merely because the plaintiff will continue to endure pain and suffering and medical expenses he will also continue to endure an impairment of earning capacity.

Second, the extent of the impairment must be shown.[64] By extent it is meant that the plaintiff must show whether the impairment is total or partial. Some attorneys seem to believe that the extent of the impairment can be deduced from the seriousness of the injury.[65] These attorneys fail to see the tautology that was earlier mentioned—namely—seriousness of the injury is defined by the courts by reference to the amount of damages. When counsel rely upon the drawing of the inference of extent of the impairment from the seriousness of the injury, they might well find that the only time the inference is justified is when the act of the defendant caused the immediate death of the plaintiff.[66] This article is concerned with many more actions than wrongful death. There must be evidence as to how disabled the plaintiff will be as a result of the particular injuries.

Third, the pecuniary value of plaintiff's earning capacity must be

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McLaughlin, 107 Pa. Super. 489, 164 Atl. 71 (1933); Bierbach v. Goodyear Rubber Co., 54 Wis. 208, 11 N.W. 514 (1882).

[61] St. Louis, I.M. & S. Ry. Co. v. Eichelman, 118 Ark. 36, 175 S.W. 388 (1915); Ray v. United Electric Rys. Co., 53 R.I. 173, 159 Atl. 637 (1932); Boggess v. Baltimore & O.R. Co., 234 Pa. 379, 83 Atl. 356 (1912).

[62] There were no cases found in this area. This is probably the result of all trial courts recognizing the fact that this evidence would be irrelevant to show earning capacity.

[63] This will include a showing of the plaintiff's life expectancy.

[64] Burns v. Dunham, Corrigan & Hayden Co., 148 Cal. 208, 82 Pac. 959 (1905), where it was shown that the plaintiff continued to operate his business with continuing success, thus showing that there was no impairment.

[65] Phillips v. Jaecker, 204 Wis. 273, 234 N.W. 745 (1931), where the plaintiff failed to show that the injury disabled him from pursuing his labors. The court recognized the fact that it could not be assumed that the injury caused such a disability.

[66] Where the injury causes death, it can be assumed that the earning capacity of the deceased has been totally impaired.

shown.[67] In this section, the assumption is that evidence of profits may be used for that purpose. Plaintiff may show the profit for individual preceeding years or he may show an annual average.[68] When there has been an increase in profits in the most recent years, that is when the economic cycle for the business is on an increase, the plaintiff probably will show the profits for each individual year. On the other hand, if the economic cycle is on a decrease the plaintiff will probably show the annual average. The defendant should be alert to this practice and not allow the plaintiff to gain any advantage merely because of the figures he chooses. Plaintiff's present or future earning capacity must be shown for purposes of comparison.[69]

Fourth, the plaintiff should, and may be required to, offer all evidence which will enable the jury to project the proof of past profits into the future. If the trend of profits is increasing the plaintiff should introduce expert evidence as to the probabilities that the increase will continue. The study of economics has enabled industrial economists to make fairly accurate and reliable predictions as to the economic future.[70] The obligation of the plaintiff to offer this evidence is no different than the burden imposed on the plaintiff in proving his entire case, when there are no presumptions. The penalty for failure to meet this burden is the same.

These requirements are applicable to all cases no matter how extensive the injury or of what duration, except it will not be necessary to project evidence of past profits into the future if the impairment was temporary and has ceased to exist at the time of the trial. In a case where a temporary injury has occurred and has ceased prior to the time of the trial, the plaintiff has a better opportunity to demonstrate the relevancy of the evidence of profits. He might be able to show that the market conditions remained the same during the disability and that the labor of others was held constant, except for the plaintiff's personal control and supervision. This would negate the factors which in other cases cause profits to fail to reflect plaintiff's earning capacity. The plaintiff has in fact conducted a controlled experiment where all of the variables were held constant. The changed result can, therefore, be attributed to the uncontrolled variable—plaintiff's earning capacity. Future profits cannot be tested in this manner. If the plaintiff is unable to show that the economic conditions remained the same and that the labor of others remained constant, except for the personal control and supervision, then past profits have all of the inherent errors of future profits.[71]

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[67] Simpson v. Pennsylvania R. Co., 210 Pa. 101, 59 Atl. 693 (1904). See note 25 *supra*.

[68] Sinclair v. Columbia Telephone Co., 195 S.W. 558 (Mo. App. 1917).

[69] Town of Elba v. Bullard, 152 Ala. 237, 44 So. 412 (1907); Phillips v. Jaecker, *supra* note 65.

[70] *Supra* at page 185.

[71] *Supra* at page 183-84.

In *Kranold v. City of New York*[72] the issue was raised as to whether the plaintiff might testify as to what portion of profits was due to plaintiff's abilities and what portion was a return on invested capital. Unfortunately, the court did not get to the problem. The plaintiff had introduced evidence of $3000 per year profits from a business requiring an investment of $1000 and the trial court refused to allow the issue of impairment of earning capacity to go to jury. The trial court held that by plaintiff's own testimony it was apparent that a part of the profits were the result of return on investment and therefore the question could not go to the jury. The plaintiff then tendered evidence of the portion of profits attributable to return on investment. The trial court refused this offer of testimony. Upon review, the court decided that the ratio between profits and investment was almost conclusive argument against the theory that plaintiff's business was one which yielded profits from invested capital. Therefore, the court decided that the issue of loss of earnings should have been submitted to the jury on the evidence of lost profits. Two aspects of this decision are worthy of comment. First, although there may be disagreement with the adoption of a ratio of 1 to 3 as almost conclusive of the fact that the profits were primarily the result of plaintiff's personal abilities, the court adopted the correct approach. It was determined by experience, logic and reason that these profits were relevant evidence of impairment of earning capacity. Second, the question of plaintiff introducing evidence which is designed to segregate the separate elements of profits is a challenging issue. The logical answer is that the plaintiff should be permitted to do so, since this is an attempt to reduce the evidence to its relevant parts. If this is the decision, then the jury should receive only the evidence of profits which is attributable to plaintiff's personal services, since this is the only relevant portion of the evidence. If the defendant desires a further elaboration of the mathematics, then he cannot complain if the answer to such inquiry contains evidence which would otherwise be irrelevant. Some courts have adopted the view that the plaintiff cannot introduce evidence of profits irrespective of ability to segregate the elements.[73] This view rests on the "all or none" approach. That is, either the profits are attributable to plaintiff's abilities and are admissible or they are attributable to other factors as well and are inadmissible. These courts are either adopting the view that elements of profits cannot be separated and therefore they will not hear plaintiff attempt to do so, or that the separation is so time consuming that the court will not permit it. As has been earlier observed, impairment of earning capacity in many cases is the most important element of damages and to formulate a rigid rule against the admissibility of what may be plaintiff's best evidence for either of the foregoing reasons is a substantial denial of justice to the plaintiff.

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[72] 186 N.Y. 40, 78 N.E. 572 (1906).

[73] *Supra* at page 191.

Proof of Impairment of Earning Capacity in Jurisdictions Where Evidence of Profits is Inadmissible

When a court refuses to allow testimony of profits, for any reason, the plaintiff still has the right to receive damages for impairment of earning capacity. The obvious difficulty is what evidence is available to the plaintiff to meet his burden. The cases are not much assistance in answering this problem. In *Mahoney v. Boston Elevated Ry. Co.*,[74] the court stated:

> One is not precluded from recovering loss of earning capacity because he happens to be engaged in business for himself; but he cannot prove what is in substance profits from a business under the semblance of earnings. The plaintiff may show the nature and extent of the business conducted by him, the part actually performed by him, and the compensation usually paid to those performing a like service for others. These are circumstances which may be helpful in determining the value of the time he has lost, in order to reach the ultimate result of just compensation for the injury sustained.

After the plaintiff has introduced evidence of the nature and extent of his business, including the economic prospects, he then introduces testimony of his role in the business.[75] The amount of education and training and the cost thereof are relevant to plaintiff's earning capacity. He may testify as to compensation of others who are doing like or similar work and he may testify as to their earning capacity, if it is not in the form of profits.[76]

Where the business has employed another to occupy plaintiff's former position evidence of salary to this individual is relevant to plaintiff's earning capacity.[77] However, contrary to the holding in *Lombardi v. California Street R. Co.*,[78] this amount should not be a maximum for plaintiff's recovery. The fact that another has been hired in plaintiff's stead is not conclusive that plaintiff's earning capacity is no more than the value of the other person's services, nor is it conclusive that plaintiff's earning capacity is equal to that of the substituted person.[79] The plaintiff could be more or less efficient or the immediate need created by plaintiff's absence might be the controlling factor as opposed to the labor market value of the new employee.

Any further discussion in this subsection of what evidence is available in a particular case would require knowledge of the facts of the particular case. Otherwise, this would be an attempt to anticipate sources

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[74] 221 Mass. 116, 118, 108 N.E. 1033, 1034 (1915).

[75] Hanna v. Stoll, 112 Ohio St. 344, 147 N.E. 339 (1925). See note 19 *supra*.

[76] See note 19 *supra*.

[77] Murphy v. Pittsburg Rys. Co., 292 Pa. 191, 140 Atl. 897 (1927); Lo Schiavo v. Northern Ohio Traction & Light Co., 106 Ohio St. 61, 138 N.E. 372 (1922).

[78] 124 Cal. 311, 57 Pac. 66 (1899).

[79] Stymes v. Boston Elevated Ry. Co., 206 Mass. 75, 91 N.E. 998 (1911).

of pertinent lay and expert testimony. As a generalization, it would appear that evidence of the marketability of one's labor is on the increase. In the final analysis, the availability of evidence will, as always, be determined as a result of the investigation by the plaintiff's counsel.

Conclusion

The problems that have arisen out of the role of profits in personal injury litigation can be distilled into two. First, the plaintiff must show that he has incurred an injury, and second, that the defendant's negligent act caused the injury. These are not singularly difficulties of a plaintiff attempting to show an impairment of earning capacity, but exist as regards every damage for which plaintiff seeks compensation.

The first is a problem of proof. The plaintiff has the burden of proving that he has been disabled to such an extent that his earning capacity has been impaired and he must show the extent of the impairment. For these purposes he must show what his earning capacity was before the injury in comparison to what it is after the injury. When he is engaged in a business which produces profits which are primarily the result of his personal endeavors and where the labor of others and the investment of capital is small, profits are a measure of his earning capacity and should be admitted as relevant evidence thereof. Evidence of profits earned in the past are also relevant as to what the plaintiff would have made in the future were it not for the defendant's act. Proof of the economic future, if available, should be introduced by the plaintiff to enable the jury to project the evidence of loss into the future. The courts should recognize that the future as regards impairment of earning capacity is no different than the future in respect to other elements of damages, and that the best rule is one that requires the plaintiff to introduce only the best evidence obtainable.

Second, the plaintiff must show that his injury was caused by the defendant. As with the first, if profits are to be the measure, to prove the causation the plaintiff must show that the profits were the result of his personal abilities. He must show that the exercise of his faculties determined the amount of the profits. If he cannot do so then he must show the value of his services through other evidence.

Finally, many of the problems that have been encountered in this area could and should be averted by proper presentation of the plaintiff's case. Failure to do so produces no reward for plaintiff or his counsel.